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No. 84-1728

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not establish any substantive limitations on a federal agency's managerial right to make determinations with respect to contracting-out, but instead only restates an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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INTEREST OF THE AMICUS

The National Federation of Federal Employees is the second largest labor union which represents federal employees by, *inter alia*, negotiating collective bargaining agreements with federal agencies and representing such employees through negotiated grievance and arbitration procedures. *Amicus* and their members have a vital interest in this case which questions to what extent con-

tract proposals concerning contracting-out procedures are a mandatory subject for bargaining.

Petitioner urges this Court to hold that any contract proposal that affects agency contracting-out decisions is contrary to the management rights clause of the Civil Service Reform Act and thus nonnegotiable. The position urged by the government is not supported by the statutory language of the Act that authorizes negotiations concerning procedures which an agency will observe when making determinations to contract out work to the private sector.

Amicus was a party in *Defense Language Institute* v. *Federal Labor Relations Authority*, 767 F.2d 1398 (9th Cir. 1985), which involved the same issue as the instant case.[1] *Defense Language Institute*, which was decided after certiorari was granted in this case, is cited by the government in its brief (Pet. Br. 19).

Amicus is submitting its brief to assist the Court in its consideration of the issues raised by this litigation. *Amicus* intends to present in simple fashion arguments that it does not anticipate respondents will dwell upon which are nevertheless in support of respondents' position.

STATEMENT OF THE CASE

Amicus adopts the statement of the case of respondents.

SUMMARY OF ARGUMENT

The gist of our argument is that the disputed proposal, calling for compliance with OMB Circular A-76, is primarily procedural in nature. It does not "directly interfere" with management's right to make contracting-out determinations. Management remains the sole determinator. The proposal merely sets forth generally the proce-

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[1] *Amicus* intends to file a petition for a writ of certiorari on or before November 6, 1985, in the cited case.

dural steps management will observe in exercising its authority. Thus, the proposal is negotiable.

The fact that the proposal, if adopted by the parties as a contract term, would be grievable does not cause the proposal to become nonnegotiable. The proposal does not suggest grieving the contracting-out determinations themselves. Such proposals have been found by the Authority to directly interfere with the exercise of management rights and held nonnegotiable. In addition, management has a viable recourse: to propose at the bargaining table that the contracting-out article in the parties' eventual agreement be excluded from the grievance procedure.

Thus, the instant proposal is negotiable since it does not directly interfere with the exercise of management's right to make contracting-out determinations. Deference is due the Authority's negotiability decision, and the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. The Disputed Proposal Is Procedural in Nature and, Therefore, Is Negotiable.

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, is "a comprehensive version of the laws governing the rights and obligations of civil servants, [and] contains the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 91 (1983). Title VII of the Act, 5 U.S.C. 7101 *et seq.*, requires federal agencies and unions representing agency employees to negotiate in good faith over terms and conditions of employment. 5 U.S.C. 7103(a)(12) and 7117.

Yet, many matters considered negotiable in the private sector are reserved as management rights of the agencies and, with the exception of specific areas, are not subjects for bargaining. In 5 U.S.C. 7106(a), the Act provides,

"Subject to subsection (b) of this section, nothing in this Chapter shall affect the authority of any management official of any agency" to exercise a number of enumerated management prerogatives, including the right "in accordance with applicable laws . . . to make determinations with respect to contracting-out." 5 U.S.C. 7106 (a)(2)(B). Thus, considered alone, it appears this provision renders nonnegotiable any bargaining proposal that would affect agency decisions relating to contracting-out.

However, two types of proposals are negotiable with respect to the exercise of these enumerated rights by agency management. The Act further provides,

> Nothing in this section shall preclude any labor organization from negotiating . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section[.]

5 U.S.C. 7106(b)(2). Also, agencies are required to negotiate over "appropriate arrangements for employees adversely affected" by the exercise of these management rights. 5 U.S.C. 7106(b)(3). With respect to the right to contract-out, an agency must negotiate in good faith over procedures it will observe when exercising its authority to make contracting-out determinations.

The Federal Labor Relations Authority, an independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process, adjudicates negotiability disputes. 5 U.S.C. 7105(a)(2)(E). In resolving such disputes that arise from the tension existing within Section 7106, the Authority has classified proposals as either negotiable procedures under Section 7106(b) or nonnegotiable substantive rights under Section 7106(a). To distinguish between the two, the Authority has developed a "direct interference" test.[3]

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[3] A second test was developed by the Authority when reviewing the negotiability of purely procedural proposals. Such proposals

Proposals which "stand close to the uncertain border between procedure and substance" are nonnegotiable if their adoption would "directly interfere" with management's reserved rights. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). Thus, a proposal would be declared nonnegotiable if it would directly interfere with an agency's substantive right, such as management's ability to make contracting out determinations.

While in the instant case, the Authority did not expressly classify the proposal as procedural and did not explicitly apply the direct interference test, the analysis of the union proposal is ultimately the same. (Pet. App. 9a-10a n.12). The union proposed that "[t]he Employer agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." Circular A-76 describes the step-by-step procedures agencies should follow in calculating cost analysis, the results of which assist agencies in deciding whether to contract-out a function to private industry or to retain performance of the function in-house. 44 Fed. Reg. 20556 (1979). Circular A-76 and other applicable laws and regulations are existing external limitations on management's right to make contracting-out determinations. The union proposal merely provides a contractual procedure to assure compliance with Circular A-76 and other applicable contracting-out laws and regulations. The proposal does not establish, either expressly or by incorporation, additional limitations on management's substantive right to make contracting-out determinations than already exist externally. If the proposal became a part of the labor contract between the parties, the agency still would retain the full degree of discretion to make con-

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are negotiable unless the agency can show that implementation would prevent management from "acting at all." *Department of Defense* v. *FLRA*, 659 F.2d at 1153.

tracting-out determinations. The proposal would not "directly interfere" with the exercise of that discretion by management.

In concluding that the disputed proposal is negotiable, the Authority implicitly found the proposal to be a procedural limitation, which is permissible under 7106(b)(2), rather than a substantive limitation on management's right to contract-out. This conclusion has been confirmed by a subsequent Authority decision. In *AFGE, Local 225 and Department of the Army*, 17 FLRA 417 (1985), the Authority referred to the proposal in the instant case as "being only procedural in nature" creating no substantive limitations on management's authority to contract-out. At 422.

In summary, application of the "direct interference" test illustrates that the disputed proposal does not prevent management from making contracting-out determinations but merely requires management to follow procedures that already exist. Since it does not directly interfere with the exercise of a management right, the proposal is not in conflict with 7106(a)(2)(B). Rather, the proposal states a procedure, consistent with 7106(b)(2), that management will observe in exercising its right to make contracting-out determinations, and thus is negotiable. This Court can conclude, therefore, that the deference due the Authority is warranted and affirm the judgment of the Court of Appeals.

II. Access to the Grievance Procedure Is Not a Factor in Determining Whether a Proposal Is Negotiable.

All collective bargaining agreements must contain a negotiated grievance procedure and binding arbitration for the resolution of contractual disputes. 5 U.S.C. 7121 (a) and (b)(3)(C). Once the Authority holds a proposal negotiable as procedural under 7106(b)(2), or as an appropriate arrangement under 7106(b)(3), and the

parties adopt the proposal as a contract term after further bargaining, violations of that term are subject to the negotiated grievance procedures, unless specifically made nongrievable by the contract. 5 U.S.C. 7121(a). Besides those matters that are explicitly excluded from grievance coverage, 5 U.S.C. 7121(c), or specifically made nongrievable by the contract, 5 U.S.C. 7121(a)(2), grievances are any complaint "concerning any matters relating to the employment of the employee," 5 U.S.C. 7103(a)(9)(A) & (B); the effect, interpretation or breach of the contract, 7103(a)(9)(C)(i); or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment," 7103(a)(9)(C)(ii). Proposals found by the Authority to be primarily procedural in effect, and therefore negotiable, and that are incorporated into the contract can be grieved in order to learn their effect or interpretation or to determine whether a breach has occurred. 5 U.S.C. 7103(a)(9)(C)(i).

Petitioner argues that if the disputed proposal, calling for compliance to Circular A-76 and other applicable contracting-out laws and regulations, is negotiable, it would be subject to the grievance procedure. The net effect, according to the government, would be that employees and labor organizations could challenge the exercise of management's right to make contracting-out determinations through the negotiated grievance machinery. However, the Authority negotiability review process considers how the proposal "affects" the relevant management right and not "what if" the proposal should be grieved and decided by an arbitrator. As mentioned above, the Authority analyzes whether the proposal will "directly interfere" with the exercise of a management right. If it does not, and management remains solely in control of the final determination, the proposal is found to be a negotiable procedure management will observe when exercising its rights. A finding in favor of negotiability

only requires the agency to bargain over the proposal in good faith and upon the union's request. The Authority neither considers the proposal's merits nor orders the agency to agree to it. *Department of Defense*, 659 F.2d at 1147.

The instant proposal should be compared to proposals that attempted specifically to provide a grievance procedure to challenge management determinations with respect to contracting-out. *See AFGE, Local 225*, 17 FLRA at 421; *AFGE, Local 3403 and National Science Foundation*, 6 FLRA 669, 673-675 (1981). The Authority held such proposals nonnegotiable because the proposed grievance procedure would cover the actual decision to contract-out itself. *Id.* No grievance procedure can be negotiated which would deny authority to an agency to exercise its management rights. *See AFGE, Local 1968 and Department of Transportation*, 5 FLRA 70, 77-80 (1980), *enforced sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1981), *cert. denied* —— U.S. —— (1983) (proposals establishing grievance review of the critical elements and performance standards determined by management held not negotiable). Unlike these nonnegotiable proposals, the instant proposal does not propose to establish a grievance procedure to challenge the actual contracting-out determination. Rather, it proposes that management comply with the step-by-step procedures contained in Circular A-76 which management must observe in the process toward making its contracting-out determination.

Petitioner also complains that adherence to a negotiated grievance procedure will cause delay and expense in implementing contracting-out determinations. However, these concerns do not qualify as a valid basis for undermining the negotiability of a contract proposal. *Department of Defense*, 659 F.2d at 1153. A negotiated grievance procedure is mandated by the Act, 5 U.S.C. 7121, and serves as a legislatively intended check for em-

ployees. The Court should note that in the give and take of bargaining encouraged by Congress, the agency is free to propose that the article pertaining to contracting-out procedures be excluded from the scope of the grievance procedure. Management has a means of protecting its interests without resorting to the judicial process with claims of dire consequences.

Overall, petitioner's sweeping arguments demonstrate a serious and unhealthy distrust of the grievance/arbitration process and of the Authority's ability to rectify or modify arbitration awards, 5 U.S.C. 7122, that impinge on management determinations protected by 7106(a). Obviously, Congress had more faith and confidence in the system that it legislated. This Court ought to protect what Congress has created rather than dismantle or greatly restrict it. The Authority's decision deserves deference and the judgment of the Court of Appeals, upholding the Authority, should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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